622, 56 Am. Rep. 101; *Smith* v. *Davenport,* 45 Kans. 423, 23 Am. St. Rep. 737, 11 L. R. A. 429. At common law a parent was not liable for the torts of his child. *Moon* v. *Towers,* 8 C. B. (N. S.) 609; *Peterson* v. *Haffner,* 59 Ind. 130. And the authorities are unanimous in holding that the child must be the servant of the father and furthering his business at the time of the injury to render him liable. *McNeal* v. *McKain* (Okla.) 126 Pac. 742, 41 L. R. A. N. S. 775; *Joel* v. *Morrison,* 6 Car. & P. 511; *Loomis* v. *Hollister,* 75 Conn. 718, 55 Atl. 561. The principal case brings to mind an incongruous situation. A child, normally not a servant is held to be a servant under circumstances where an actual servant would be normally held not to be one. SHEARMAN & REDFIELD, NEGLIGENCE, 147; *Bard* v. *Yohn,* 26 Pa. St. 482. For a general discussion of the subject of the principal case see 7 MICH. L. REV. 180 and 526.

PARTNERSHIP—WHAT CONSTITUTES PARTNERSHIP AS DISTINGUISHED FROM AGENCY.—A contracted to work for B at a salary of $125 per month, and in addition thereto one-half the profits over $3,000. *Held,* that though the compensation was measured in part by the profits, the contract did not create a partnership. *Goodin* v. *Pitt* (Nev. 1913), 134 Pac. 459.

In another recent case there was a contract of mandate, providing that after defendant company had received its commission, and all the expenses had been paid, the profit, if any, was to be divided share and share alike. *Held,* to be no partnership; that the presumption of partnership arising from participation in the profits will yield to other provisions in the contract, and the evidence and circumstances surrounding same. *Bluefields S. S. Co.* v. *Lala Ferreras Cangelosi S. S. Co. et al.* (La. 1913), 63 So. 96.

These two cases, one arising under the civil law, the other in a common law jurisdiction, illustrate the prevailing state of the law, after the marked contrariety, which existed from the decision in *Waugh* v. *Carver,* (1793), 2 H. Blackstone 235, down to the case of *Cox* v. *Hickman,* (1860), 8 H. of L. Cas. 268. At the present time in this country there are only three states, (New York, Pennsylvania, and North Carolina), that adhere to the principle laid down in *Waugh* v. *Carver,* namely the arbitrary test of profit-sharing, and these courts in this regard are criticised as "like the Bourbons, who learned nothing and forgot nothing." The doctrine, as applied in these states, is found in *Leggett* v. *Hyde,* 58 N. Y. 272; *Wessels* v. *Weiss,* 166 Pa. St. 490; and *Southern Fertilizer Co.* v. *Reams,* 105 N. C. 283. The two principal cases seem to follow the reasoning of Judge COOLEY in *Beecher* v. *Bush,* 45 Mich. 188, in which it was observed, "that in so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests, it was erroneous and mischevious." This idea departs from the principle laid down in *Cox* v. *Hickman,* in which it was recognized that an arbitrary test was necessary to insure an unambiguous and settled state of the law on such questions, and the test applied was that of mutual agency. Judge COOLEY remarks that there are but two ways of creating a partnership relation; by estoppel, and by express contract with the intention to form a partnership. The relation must com-

prise the essential elements of partnership; (1), Community of interest in some lawful commerce or business, and (2), mutual agency, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, *to the extent of making one the sole agent of the other and of the business.* Applying these principles to the two principal cases it will be found that every essential element is present, except the intention to create a partnership. In fact there was a feature present, which Judge COOLEY does not consider, but which was the basis of the decision in *Waugh* v. *Carver;* namely, that of profit sharing. This necessarily resolves the question into the following proposition; given two states of facts, one containing all the elements of partnership, including intention to create same, the other consisting of all the elements except the intention, the result will be that one is a partnership, while the other is not.

PLEADING—CONTINUANCE.—Defendant moved for a continuance in order to get the attendance or deposition of a certain witness. Plaintiff filed a cross-affidavit, setting out that the witness was her husband, that he would not testify against her, that he could not without her consent, and that she would not consent. The continuance was, however, granted, and plaintiff applied for a writ of mandamus to compel the trial judge to set aside the continuance and proceed with the trial. The writ was denied on the ground that it did not appear to what the witness would testify, and COMPILED LAWS OF MICHIGAN, § 10,213, contained many exceptions which were not negatived by the cross-affidavit. *Snyder* v. *Berrien Circuit Judge,* (Mich. 1913), 142 N. W. 767.

The general rule is that the affidavit in support of the motion for a continuance should state the facts to which the witness will testify, and if it does not, it is not error to refuse a continuance. *People* v. *Jackson,* 111 N. Y. 362; *Hutts* v. *Shoaf,* 88 Ind. 395; *State* v. *Falconer,* 70 Iowa 416; *Commonwealth* v. *Winnemore,* 1 Brewst. (Pa.) 356; *Carthaus* v. *State,* 78 Wis. 560. The above rule would require that the defendant should have stated in his affidavit the facts to which the witness would testify, if present, and then, by reference to the statute it would appear whether, as husband of the plaintiff, the witness could testify against her. If it appears that the witness can not be compelled to testify to the facts set out in the affidavit, a continuance is properly refused. *Dungman* v. *State,* 48 Wis. 485. If the facts are set out, the other party may avoid a continuance by an admission that the witness, if present, would testify to the facts so stated. *Hubbard* v. *Kirby,* 38 Ark. 102; *Chicago City R. Co.* v. *Duffin,* 126 Ill. 100; *Hartford Ins. Co.* v. *Hammond,* 41 Colo. 323; *Pate* v. *Tate,* 72 Ind. 450; *Dial* v. *Valley Mutual Life Association,* 29 S. Car. 581; *Kitchens* v. *Hutchins,* 44 Ga. 620. The granting of a continuance is largely within the discretion of the trial judge. *Barrow* v. *Hill,* 54 U. S. 54; *Watts* v. *Cohn,* 40 Ark. 114; *Maynard* v. *Cleveland,* 76 Ga. 52; *Lewis* v. *Lamphere,* 79 Ill. 187; *De Grote* v. *De Grote,* 175 Pa. St. 50. Mandamus will not ordinarily lie in cases of discretionary acts. *Ex parte McKissock,* 107 Ala. 493; *Board of Com'rs. of Shoshone County* v. *Mayhew,*